THE NEW YORK TEST OF VESTED REMAINDERS.

We cannot fully understand the point of view of those learned in the old law, the object of the revisers' definitions, and their effect upon the new system of expectant estates, without a clear conception of the common law of future interests. Especially must we have clearly in mind two rules of the common law: (1) That every presumption is in favor of a future estate being vested; (2) "The present capacity of taking effect in possession, if [the possession] were to become vacant before the remainder determined, is said universally to distinguish a vested from a contingent remainder."[1]

A short historical review will be of assistance. After the Battle of Hastings, or Senlac, in 1066, William the Norman became King of England. Leaving his brother Odo in charge, he returned to Normandy to restore order there. During his absence, a large number of the English landowners rebelled. When he had conquered them, William determined to make it an object for the occupants of the land to support him. He declared the rebels' lands forfeited; and received conveyances from many others who thought it better to lease from him, with his pledge of protection, than to resist him. In England, though little larger than the State of New York, he formed about sixty thousand manors, which he leased under an agreement that each should furnish on demand an armed warrior for at least forty days a year, and that tenant and land should be subject to other payments and burdens. Since only one warrior was required from each manor, that one was the tenant, and when the lease was to A and his heirs, there was but one heir, the eldest son.

The occupant was no longer the landowner. The new land law was a law of tenant's rights and duties. The King was the land lord. The new system provided for the descent of the tenant's rights to his heir, but not for their alienation. By *Magna Charta,* however, the tenant was allowed to alien a part, provided he retained enough to insure the fulfillment of his duty. The part so aliened was often limited to his eldest son for life, and then to the eldest son of such eldest son, an so on *in perpetuam,* or in

[1]Nelson, J., in Hawley *v.* James (N. Y. 1836) 16 Wend. 61, 137.

some other way by which a definite line of descendants of a certain kind should take in endless succession. Thus was created "the fee tail of English law, a strict and practically perpetual entail. The power of alienation was reintroduced by the judges in the *Taltarum Case* (Yr. Bk., 12 Edw. I, fol. 19) by means of a fictitious suit for recovery which had originally been devised by the regular clergy." [2]

Any conveyance of tenant's rights, however, by which the possession would be vacant for even a single day, would be absolutely void—for on that day the King might need his services, "and the law is nice to an instant."[3] About the middle of the sixteenth century a tenant was allowed to divide or convey his tenant's right in such a way that there might or might not be a tenant at the end of the prior estate or interest; but if the new tenant were not ready during or at the end of the prior estate, he never could take; his interest was gone forever.[4] Such an interest in land was called contingent, because it might or it might not vest in interest. In *Leonard Lovies's Case,*

"William leases to John for the life of John, rendering to William 40s. rent during the life of William, and after the death of William to John and his heirs; this remainder to John cannot vest immediately, because peradventure it will never vest in estate or interest (the court does not say '*in possession*'), and the contingent in this case is the time of the death of William; for if William dies, John living, the remainder is good; but if William survives John and dies after him, the remainder is void. * * * For where it is doubtful and incertain whether the use or estate limited *in futuro* will ever vest in estate or interest or not, there the use or estate is said to be in contingency because, upon a future contingent, it may either vest or never vest as the contingent shall happen." [5]

To be the next taker, it was not enough that the remainderman should be the heir presumptive, or even the heir apparent. He, or if the remainder be in fee, his heir, devisee or assign claiming under him, must be certain to take at least a share, whenever the prior estate should cease. If the remainderman was a designated person to whom the remainder or a share in it was invariably fixed, he was *a* next taker; otherwise his estate or interest was contingent,

[2] Encyc. Brit. (9 ed.) Article on Entails. A full account of the mysteries of *præcipe* and vouching, and of the process of fine (*finis concordia*) and proclamation, will be found in II Bl. Comm. Ch. 7.

[3] Thompson *v.* Leach (1697) 1 Lord Raym. 313, 316; Colthirst *v.* Bejushin (1550) Plowd. 21, 24, 25; Corbet *v.* Stone (1653) Raym. 139, 144.

[4] Archer's Case (1597) 1 Co. Rep. 66 a. See *supra,* p. 594.

[5] (1613) 10 Co. Rep. 78, 85.

subject to destruction by the forfeiture of the holder of the prior estate, and wholly in his power.[6] The result was, that whenever a remainder might with any show of reason be held vested,—or where the strict feudal rule against abeyance of the seisin would make void a contingent remainder and thus frustrate the testator's intent—the court gave effect to the testator's probable but undeclared intent, by holding the remainder vested, subject to divest if later events should show the remainderman not entitled. If the remainderman would certainly be entitled to a share, but other members of the class might be born, or otherwise become entitled, before the prior estate ended by the death of the particular tenant, the court held the remainder to the class vested in the member or members living and qualified at the time of the particular tenant's forfeiture, but subject to open and let in, as to their shares, any others who might qualify, so that at the death of the particular tenant, the same persons would take, and in the same proportions, as if there had been no forfeiture.

From the determination that such a remainder was vested, it followed necessarily that it could be conveyed. But the remainderman could convey only such share as he would have at the natural termination of the prior estate. A purchaser, therefore, must risk the loss of the shares of any who might become entitled after the purchase, but before the termination of the prior estate. Under the old law, a contingent remainderman could not convey, by common law conveyance, even the interest he had; but "all who are *in esse* at the time of the death of the testator take vested (and consequently *transmissible*) interests immediately upon the testator's death."[7]

Again, devises were frequently made to A for life, with remainder to such children of A as A should appoint, with remainder, in default of appointment, to B. Here the testator's intention was manifest that A should enjoy during life, and that B should never enjoy until A had died without making a valid appointment. But rather than allow A to defeat both A's children and B by levying a fine, the courts declared that the testator intended B's interest to be vested. Otherwise, the common law rule forbidding that the fee should be in abeyance, would have rendered the remainder

[6]See note to Archer's Case, 2 Co. Rep. (Thomas & Fraser's Ed.) 166 a; Doe *v.* Prigg (1828) 8 B. & C. 231; V Edmonds, N. Y. Statutes at Large (1863 ed.), App. 312; Fowler, Real Property Law of the State of New York (2 ed.), 1002 *et seq.*

[7]Doe *v.* Prigg, *supra.*

void, and thus have defeated the testator's intention.[8] If A should not forfeit, but make a valid appointment, his appointee, and not B, would take.

The plan in this case would be: To A for life: Remainder in fee to such of A's children as he should appoint: But if A make no valid appointment, then to B in fee.

Blackstone's test of vested remainders, "Is the remainder invariably fixed to B?" Answer "No; A may make a valid appointment." Result, B's remainder is not vested. Blackstone's test of contingent remainders, "Is B's remainder limited upon a dubious and uncertain event?" Answer "Yes; for A may, or may not, make a valid appointment." Result, contingent.

Willes' test, "Does the commencement of B's remainder depend upon some matter collateral to the determination of A's life estate?" Answer "Yes; it depends upon A's making no valid appointment to one or more of his children. A may or may not make such appointment." Result, contingent.

My second test, "According to the plan of estates created, would B have the right at A's death?" Answer "He may or he may not, according as A makes a valid appointment or not. A may or may not make such appointment." Result, contingent.

Woodruff test, (A not having made a valid appointment) "Would B have the right, if A now die?" Answer "Yes." Result, vested.

The courts had held the remainder vested subject to divest, because of the testator's intention that B should take upon A's forfeiture. Section 31 of the Real Property Law (Cons., R. P. L. § 41) provides that: "The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power," despite the express statement in section 29[9] that the remainder to B "shall be construed as intended to take effect only" on A's death. It is clear that the object of section 29 was to prevent contingent estates being held vested, subject to divest, and to make clear the change from the old law. Without it, the definition of vested remainders in section 13[10] might not be clearly understood.

The reason why the old rule was no longer needed is clear when we examine the new law, and find what great changes it

[8] Doe *v.* Martin (1790) 4 D. & E. 39.
[9] § 29, I R. S.* p. 725 (R. P. L. § 45, Cons., R. P. L. § 55).
[10] § 13, I R. S.* p. 723 (R. P. L. § 30, Cons., R. P. L. § 40).

makes in the effect of the contingency of a remainder. Under the old law, a contingent remainder was peculiarly subject to the following dangers: (1) Destruction because a contingent remainderman was not ready and qualified at the particular tenant's death. This danger was removed by section 34.[11] (2) Destruction by the premature termination of A's estate by forfeiture. This was remedied by sections 32 and 33.[12] (3) The contingent remainderman's inability to convey his interest at common law. This was remedied by section 35.[13] (4) At common law the heir was entitled to undisposed rents. By section 40,[14] these were given to the contingent remainderman. Under both the old and the new law the contingent remainderman could obtain an injunction restraining waste.[15] It is proper that the contingent remainderman should not recover the treble damages to which the vested remainderman is entitled; for, by reason of the contingency the contingent remainderman may never have any right to either land or damages. The result of allowing such a recovery would be that, in the event of the failure of the contingency upon which the remainder depended, the person entitled would be without remedy for the waste, or would recover from a tortfeasor who had already paid damages to the contingent remainderman.

The contingent remainderman was, then, amply protected by the new law. If the contingency happened in his favor, he was just as sure to take as if from the testator's death his remainder had been vested.[16] There was no longer any need of declaring contingent estates vested subject to divest. Indeed, section 29,[9] read in the light of the old law as it was in 1828, expressly forbade the former application.

That section was wrongly construed when the old heading "Construction of certain remainders" was changed to read "When remainder not limited on contingency defeating precedent estate takes effect." If the object of the section had been to determine

[11] § 34, I R. S.* p. 725 (R. P. L. § 48, Cons., R. P. L. § 58).

[12] §§ 32, 33, I R. S.* p. 725 (R. P. L. § 47, Cons., R. P. L. § 57).

[13] § 35, I R. S.* p. 725 (R. P. L. § 49, Cons., R. P. L. § 59). See V Edmonds, N. Y. Statutes at Large, App. 304; Fowler, Real Property Law, 995.

[14] § 40, I R. S.* p. 726 (R. P. L. § 53, Cons., R. P. L. § 63). See Cook *v.* Lowry (1884) 95 N. Y. 103.

[15] Garth *v.* Cotton (1753) 3 Atk. 751, 754; Lee *v.* Whallon (1884) 20 N. Y. Weekly Digest 366.

[16] See Hennessey *v.* Patterson (1881) 85 N. Y. 91.

when remainders would take effect, the words "be construed as intended to" would have been omitted.

An examination of each case in which the plan has been stated, reveals the fact that in every remainder which would be vested according to my second test, the living remainderman could convey the absolute title for the term of the remainder; but the living remaindermen in *Coster* v. *Lorillard*,[17] *Hawley* v. *James*,[18] *Moore* v. *Littel*[19] and *Stringer* v. *Young*,[20] could not convey the absolute title for the term though the remainder would be vested according to the Woodruff test.

At common law the contingent remainderman could not convey even his interest or possibility.[21] But the title to lands had already become allodial in this State; and all feudal tenures had been abolished. Let us therefore approach the question of the object and effect of section 13, trusting to find abundant reasons for its existence and for its place between definitions of future estates and the sections limiting the suspension of the power of alienation.

One of the revisers' remedies for the evils of the old law was "to define with precision the limits within which the power of alienation may be suspended by the creation of *contingent estates*."[22]

For fear that their reason and method might not be known, they added the following note:

"To prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add, that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred."[23]

Our courts having held that section 65[24] made an exception of certain trust estates, we should add "except certain trust estates." The revisers' note, however, truly stated the law at its date; for a trustee in 1828 could give good title to a purchaser without notice

[17](N. Y. 1835) 14 Wend. 265.

[18](N. Y. 1836) 16 Wend. 61.

[19](1869) 41 N. Y. 66.

[20](1908) 191 N. Y. 157.

[21]It was not strange that the King and the judges appointed by him should not wish to extend the power of alienation beyond that given to the tenant by *Magna Charta* (*supra*, p. 687).

[22]V Edmonds, N. Y. Statutes at Large, App. 305; Fowler, Real Property Law, 996.

[23]V Edmonds, N. Y. Statutes at Large, App. 307; Fowler, Real Property Law, 998. This passage suggests that the contingent remainder might become vested in interest during the life of the particular tenant.

[24]§ 65, I R. S.* p. 730 (R. P. L. § 85, Cons., R. P. L. § 105).

of the trust, and title subject to the rights of the beneficiaries to a purchaser with notice. The other quotation from their note refers to the power being "suspended by the creation of contingent estates" under the new system. As to future trust estates, the new section 55[25] only permitted trusts for lives "subject to the rules prescribed in the first article of this title," and trusts to accumulate during the minorities only "within the limits prescribed in the first article of this title." Since section 14[26] is in the first article of the title, any future trust, suspending beyond the limit, would be void, at least for the excess. Suspension by present trust estates, *i. e.*, estates taking effect in possession at the testator's death, would form the subject of a distinct discussion. According to the reading of section 55 as enacted, before the amendment of 1830, it would hardly seem probable that present trust estates for more than two lives would be numerous. The only purpose of a trust for life was to receive rents and profits of land, and apply them to the education and support, or either, of any person during the life of such person—without right to pay the money over to the beneficiary. It was evidently intended for the protection of a person mentally incompetent, or whose habits rendered it unsafe to place the *res* in his possession. It would be strange, indeed, should such a trust be frequently created. Surely there would not be more than two such in any one estate. The trusts in *Coster* v. *Lorillard*,[17] and in *Hawley* v. *James*,[18] were not for purposes authorized by the original section 55, but came under the 1830 amendment.

If absolute title to the land for the term of a vested future estate—apart from trust estates—is not always alienable, why did not the revisers' note refer also to suspension by certain or by some vested estates? In *Moore* v. *Littel*[19] we find that during John's life, the heirs apparent could not convey absolute title to the remainder. But one more example is needed to show that if the new law makes all vested future estates alienable by absolute title, Judge Woodruff's cannot be the true test:

To A for life, then to B for life, and at B's death, to B's youngest child then living, in fee. The testator died in 1834. B's only sons were Charles—born in 1803, died in 1836—and John—born in 1839, died in 1841. B died in 1845. Since Charles was

[25] § 55, I R. S.* p. 728 (R. P. L. § 76, Cons. R. P. L. § 96). Amended, Laws of 1830, c. 320 § 10.

[26] § 14, I R. S.* p. 723 (R. P. L. § 32, Cons., R. P. L. § 42).

living at the testator's death, the Woodruff test would be: "If A and B now die, would Charles have the right?" Answer "Yes." Result, vested. In 1837, however, no sons being alive, the result would be, contingent. In 1840, John would have the right, and the result would be, vested. In 1842, and until B's death, not survived by either son, the result would be, contingent. To my second test, even when a son was living, the answer would be "The son now living may not survive A, or another may be born and survive A, and take." Result, contingent. At any of the times mentioned, under my second test, there would be no son living who could convey an absolute title to the remainder. Section 20[27] allows a contingent remainder after an estate for years only when it must vest in interest within or at the end of two lives in being at the creation of the estate. If "vesting in interest" means "would have the right if the two lives should now end," instead of "whenever they do end," we should have this result: In devise to G for thirty years, and then in fee to the youngest son of his daughter H who shall survive H, until H die, we could not tell who would survive and take as youngest son. Until H died, no son, nor all her sons together, could convey absolute title to the remainder; for none might be living at her death, or another might be born and be the youngest to survive her. But the object of requiring that the estate must vest in interest within or at the end of two lives in being is, clearly, that the owner of the term and the remaindermen may together be able to convey an absolute title to the property. If the Woodruff test is the right one, that object has not been attained.

It may be argued that *is* in section 13 shows that the section refers to the present time, "now." Of course it does; for until the testator dies or the grant is delivered, he can convey and there is no suspension. The remedy quoted above was to define with precision the time, beginning at the creation of the estates,[28] during which suspension is allowed. The estate in possession[29] is the one which begins at the creation of the estate. The estate in expectancy is the one which, according to the plan of estates created, must wait for possession till the estate in possession, and perhaps one or two other prior estates shall cease. Sections 15 and 16[30]

[27] § 20, I R. S.* p. 724 (R. P. L. § 36, Cons., R. P. L. § 46).
[28] § 41, I R. S.* p. 726 (R. P. L. § 54, Cons., R. P. L. § 64).
[29] § 7, I R. S.* p. 722 (R. P. L. § 25, Cons., R. P. L. § 35).
[30] §§ 15, 16, I R. S.* p. 723 (R. P. L. § 32, Cons., R. P. L. § 42).

state how long the power can be suspended. Section 14 declares that a future estate which suspends beyond the limit is void in its creation. The duration of the suspension, determined by lives or minorities, measuring from the creation of the estates, is the important thing. It is usually determined by the courts, if the interested parties cannot agree, in order to decide as soon as possible what estates are void in creation, that devisees may know their rights, and executors and trustees their duties. My second test makes section 13 an important factor in determining what estates are vested, and therefore alienable—and so cause no suspension of the power,—and what are contingent, and therefore prevent conveyance by living representatives, if any, of absolute title for the term. Section 13 therefore becomes an essential part of the system, and, with the aid of the plan, shows whether the suspension is beyond the limit allowed.

The confusion caused by the Woodruff test is conceded by Mr. Fowler;[31] but it is said that the test was and is "the present capacity to take possession, if the precedent estates were now determined, or should now determine." Fearne and Preston are quoted to this effect; and it is said that if A should now die, B would have the "present capacity," and therefore, even under the rule in *Archer's Case,* would be ready should A now die, and therefore the remainder is vested.

There are many answers to this argument. In the first place, the following statements are taken from Humphrey, Observations on the Actual State of the English Law of Real Property (1827), which was cited in the revisers' note:

"The owner of a contingent or eventual interest cannot dispose of it at law by deed, the maxim being that nothing is disposable but what in a technical sense is vested. * * * Estates tail with the powers of defeating them by fine and recovery constitute at this day the principal mode of settlement of land. * * * Under settlement by means of entail, the average life of the estate is one generation."[32]

From these statements it appears that, as a practical question, the premature ending of the prior estate by forfeiture was much more important than the consequences of its natural termination.

The cases cited by Fearne and other writers are those which would be expected if the "present capacity" referred to a capacity already acquired to take if the prior estate should prematurely

[31]Fowler, Real Property Law, 226.

[32]At p. 63.

terminate by forfeiture, and not to capacity to take if the prior estate should come to a natural end. But Fearne died in 1794, and two later decisions prove that if the Fearne rule referred to the *natural* determination, it was soon and decisively overruled, and the contrary established. In *Denn* v. *Bagshaw*,[33] devise was to M for life; remainder to the first son of her body, if living at the time of her death, in fee tail male; and remainder to A. M had a son who died in her lifetime, leaving a son. *Held*, M took only a life estate; neither her son nor her grandson took any estate; but the remainder to A took effect. Thus the son's estate was contingent; for, if it were vested, his son would have taken, and it would have been an estate and not simply an interest. In *Doe* v. *Scudamore*,[34] devise was to L for life, and from and after his death to B in fee if she survive him, and not otherwise; and if not, then to L in fee. *Held*, B's remainder was contingent; and was barred by a fine levied by L, though B might in fact survive L, and had the capacity to take if L had died at the time of the fine. The 1907 edition of English Overruled Cases shows that neither of these cases has been disturbed.

We have seen that the contingent remainderman under the new law is as thoroughly protected from loss by the unauthorized act of the holder of the prior estate as is the vested remainderman. The chief, if not the only, important difference between vested and contingent remainders came to be the effect of the suspension of the power of alienation. In that respect, and in regard to the extent of the suspension as determined by the plan, it became a matter of no importance who, if any one, would take if the prior estate should now cease. It was of great importance whether the power was suspended, and for how long. In determining this question, a test depending upon who would take if A should now die would be of no assistance.

Preston on Estates (1820 ed.) indexes as a "criterion" only the following definition:

"When it is certain that the remainder might take effect in possession on the determination of the preceding estates of freehold, *at whatever time*, and however early, and by whatever means these estates may determine, the remainder must be considered as vested; and it is contingent when certainty does not exist."

To quote further from the same work:

[33](1796) 6 D. & E. 512.
[34](1800) 2 B. & P. 289.

"The tenant of a vested estate has a present and *certain* interest which, though it may not yield him any immediate profit, because it does not entitle him to possession at this instant of time, gives him the *ownership* of the land for the time included in his estate. * * * A contingent interest does not give any certain or immediate right, or any estate in the land, it gives a mere possibility; a possibility coupled with an interest, when the person is fixed and ascertained * * * and mere possibilities to persons who are not ascertained, as to the survivor of several persons, to children who shall attain twenty-one, to children who shall be living at the death of their surviving parent, or the death of one of their parents, or the like contingency, are not coupled with an interest."[35]

The Supreme Court of this State in 1804, in *Doe* v. *Provost*,[36] held vested a remainder similar to the one in *Matter of Brown*;[37] but said (Kent concurring) that if the devise had been to A for life, and at her death to her surviving children, the remainder would have been contingent. Chief Justice Spencer dissented, considering the remainder contingent. While he was in practice at Albany, his son was there as a reviser. Father and son would doubtless consult each other upon so important a question. Hence his opinion is of importance in our endeavor to learn the revisers' intention.

In *Jackson* v. *Waldron*,[38] a case arising under the famous Medcef Eden will, certain parcels were devised to A for life, others to M for life, "but if either son should die without lawful issue, his part or share should go to the survivor." J died without issue. *Held*, the right of M in the land devised to J for life was, during the lifetime of J, a mere naked possibility. Senator Tracy, in the prevailing opinion, refers to Fearne as stating that a remainder depending on survivorship was contingent, and quotes Preston to the same effect.

The King's Bench in *Doe* v. *Prigg*,[6] the remainder being to the surviving children of C and D, said:

"If this word 'surviving' refers to the death of the survivor of the mother and the wife in one event, or to the death of the mother in the other, the remainder to the children is contingent, and the only persons entitled will be such children as were living when the wife died."

But it may be contended that *Williamson* v. *Berry*[39] should

[35] At pages 75, 76, 79.
[36] 4 Johns. 61, 65.
[37] (1883) 93 N. Y. 295.
[38] (N. Y. 1834) 13 Wend. 178, 219.
[39] (U. S. 1850) 8 How. 495.

control, since it construed a New York will. In that case, however, the United States Supreme Court gave no reason for concurring with the court below on this point. All the rights involved were fixed before the enactment of the revised statutes. The enactment of sections 13 and 29 could therefore have no effect. The court had before it *Cochran* v. *Van Surlay*,[40] in which Chancellor Walworth said, in construing the same will:

"It is true, that by the terms of Mrs. Clark's will, the children of T. B. Clark, then in existence, had only a contingent interest in the remainder of the estates at his death, or rather it was a vested remainder, subject to open and let in after-born children, and which was liable to be defeated by the death of the children during the lifetime of their father."

Section 29 would make such a remainder contingent. The United States Supreme Court has never constructed section 13.

The ample protection which we have seen was given to contingent remainders by the revised statutes leaves no reason for declaring a remainder in a doubtful case vested instead of contingent, unless the arguments are nearly balanced, as in *Matter of Brown*.[37]

My second test is, and the Woodruff test is not, consistent with the rule that legacies to a class are contingent when the only direction is to pay to the members of a class at a future fixed time or upon the happening of an event, when the members of the class would be known. If it be objected that the law favors the early vesting of future estates, it must be remembered that the law requires that the intent of the testator be observed in that respect. In at least two instances the new law has delayed for one life the vesting of a remainder, which under the old law would have vested at the testator's death: (1) By the law of July 12th, 1782, the tenant in tail was given an absolute fee, which he could convey. Section 3[41] stated that the fee simple should be absolute "if no valid remainder be limited thereon." Section 4[41] added that "such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of his death." It is thus clearly impossible to know whether the tenant in tail would leave issue him surviving, and the remainder is contingent. (2) Under the old law, the rule in *Shelley's Case* had vested in

[40](N. Y. 1838) 20 Wend. 365, 374. In determining the weight to be given the Chancellor's doubtful statement, see his statement of April 28, 1828, printed as a preface to I Paige Ch. Rep.

[41]§§ 3, 4, I R. S.* p. 722 (R. P. L. § 22, Cons., R. P. L. § 32).

the particular tenant the remainder limited to his heirs, so that he would possess the fee upon the testator's death. Section 28,[42] however, expressly confines his estate to his own life, and gives the remainder to those whom the law designates as heirs at his death. Section 29 in effect shows that "at his death" *means* "at his death," and not "now." This prevents the conveyance of a fee during the lifetime of the particular tenant which would be valid as against those who would be heirs at A's death, and who should not join in the grant.

Under section 4,[41] the remainder is a contingent limitation upon the fee, that is, a contingent future estate. According to the old rule that an estate should not be divided or split up into its component parts, the plan would be: To A till he die without issue him surviving: If A die without issue him surviving, then to B in fee. A has a vested estate in possesion for his life at least; but it is defeasible by his death without surviving issue. Section 4 declares B's estate contingent; but A's estate is not classified. Under the old law, it would have been important that A should have a vested estate in fee, for unless the fee as well as the life estate were vested, he could not convey the fee, even subject to divest. Now, however, a contingent remainderman can convey his contingent interest. The logical plan, so far as affects the question of the estates after A's death, would therefore seem to be: To A for life: If he leave issue him surviving, to A in fee: If he leave none, to B in fee. If this second plan governs, the life estate is of course vested; but neither remainder is vested. If the former plan is to govern, the Woodruff test would make B's right vested: under my second test it would be contingent. The second plan yields a result consistent with the revisers' note:

"The necessary effect of every species of contingent limitation, whether to the 'heirs' of the first taker, or to strangers, is to place the fee in abeyance and to suspend its alienation until the contingency happens.[43]

They evidently considered the remainder to the heirs contingent.

Of the effect of section 28 upon the rule in *Shelley's Case,* Chancellor Kent wrote as follows: "And in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders." He therefore

[42] § 28, I R. S.* p. 725 (R. P. L. § 44, Cons., R. P. L. § 54).

[43] V Edmonds, N. Y. Statutes at Large, App. 310; Fowler, Real Property Law, 1001.

had in mind a construction which would make the remainder in *Moore* v. *Littel*,[19] contingent, when he said: "The definition of a vested remainder in the New York Revised Statutes appears to be accurately and fully expressed." Of the new definition of contingent remainders, he said: "The definition in the New York Revised Statutes, [§13] is brief and precise."[44] It may be suggested that if the power to convey an absolute title for the term of the remainder be the important thing, the definition of vested remainders would surely have stated that as a test. In reply, let us note that one with power of sale might convey a good title, though having no estate. On the other hand, under sub-sections 3 and 4 of section 55, trustees, though having a vested estate, could not convey.

The revisers believed that their plan would render the law in most cases "so concise, simple and perspicuous, as to be intelligible, not only to professional men, but to persons of every capacity." This was one of their great objects.[45] The layman, in planning his will, thinks of the devisee as in possession of, and enjoying the home, or other land, and rarely as selling it and enjoying the proceeds. The definition of vested remainders would much more certainly and clearly warn a testator that the remainder he intends to create is void if it will not entitle the remainderman to possession within the limit fixed by the preceding sections, than would Blackstone's definition which speaks of the land as "invariably fixed to remain to a determinate person." The retention in substance of Blackstone's definition of contingent remainders, would retain to the judge, lawyer and conveyancer the benefit of the old learning. The definition of vested remainders, so closely followed by section 14, declaring certain estates void in their creation, would bring before the testator's mind the fact that the estate he was planning would be wholly void unless the remainderman would have the right to the possession of the land within the period limited by law. The insertion of *"either"* in the first sentence of section 13 would warn him that the remainderman's power to convey absolute title to the remainder would be unduly suspended, and the remainder void, unless, according to the plan of estates created, he would surely have the right upon the ceasing of the prior estate. The comprehension of the true meaning of either of the definitions would aid in understanding the other.

[44] IV Comm.* 202, 208, 232.

[45] V Edmonds, N. Y. Statutes at Large, App. 237.

I believe that the revisers' reason for substituting the new definition of vested remainders for that of Blackstone was to point out to non-experts the danger of creating void estates, by indicating a test which a layman would be more likely to understand. The object of section 13 was not to indicate when a remainderman would be entitled to possession, but to furnish a warning against the creation of void estates. Fixing death as the penalty for murder not only points out the duty of the court and the sheriff, but deters men from the commission of murder, through the fear of the loss of their own lives.

The confusion has been caused by failure to understand that the definition of vested remainders was an artificial definition. Understanding it to be artificial, we see that the object of section 13 was to point out the ownership of the land for the term of the estate, and the consequent power to convey the absolute title to the land for that term.

If the foregoing reasoning be correct, we have reached the following results: (1) The statutory definition of vested remainders, taken literally, does not mean "were the prior estate now to cease"; (2) that definition is consistent with the definition of contingent remainders, with the rest of Chapter I, with the definitions under the old law, and with the decisions under such definitions, except as the courts varied from the definitions to save from destruction by the particular tenant's forfeiture remainders which were in their nature contingent.

I had reached this point in my reasoning when the opinion was handed down in *Matter of Wilcox*.[46] The remainder in this case to Maria's husband and children was held contingent, though they were, and no child of Frances was, living at the testator's death. Under the Woodruff test, the substituted remainder would have been vested. Under my two tests, it would be contingent, because Frances might have a child who would attain its majority, and that contingency would appear on the plan of estates created.

If it now seem clear that the revisers' definition of vested remainders is in substance the same as Blackstone's definition, there was no need for them to announce, or justify, or explain the object or effect of a change. Section 13 furnishes a test by which we may discover what future estates are contingent, and therefore suspend the power of alienation.

If there remain any doubt of the need for a plan of the estates

[46](1909) 194 N. Y. 288, 296.

created, from which it can be decided whether the estate is vested or contingent, I wish to express the opinion that a plan is made necessary by a single word in section 14. In *Schettler* v. *Smith*,[47] it is said that what *might* have happened, or *might* so happen, determines whether a future estate is void for undue suspension of the power. But section 14 says *"shall"* and not *"may."* The section declares it "void in its creation," that is, at the testator's death, without waiting to see whether it will suspend the power beyond the limit. It is easy enough to say whether it *"may"* suspend too long; but how can we know whether it *"shall"*? For example: Devise to A for life: Then to B for life: Then to C for life: Then in fee to such of B's children as shall survive C. A, B and X survive C. B and X predecease A. Clearly it will be known within two designated lives what children of B will survive C. Those children could unite with A in conveying an absolute fee: there would be no suspension. Or suppose that the remainder is to such children of A as shall survive B. Since both A and B may survive C, the remaindermen would not be ascertained till the end of the three lives. Section 17,[48] however, provides that in the case of a remainder after three successive life estates, the third is void. Thus A's children who survive B, being ascertained at the end of the two lives according to the plan, take by force of section 17. The remainder is valid. In order that the word "shall" in section 14 may have due force, must not the plan, and not the "may" or "possibility" control? In the last devise, the plan shows that at the end of the first two lives mentioned, the remaindermen will be known and can convey, so that the remainder is vested, and therefore not void under section 14.

That the revisers intended the plan of estates created to decide is further shown by the fact that the last part of the definition of vested remainders refers to "the intermediate or precedent estate."[10] Where the devise is to A for life, then to B for life, then to C in fee, if B should predecease A, would the definition of vested remainders then require that C should have the right while A was yet living? Such a result would be absurd. If we allow the plan to control, however, no such absurdity is encountered. B's estate must come after A's death; it cannot begin until A's life estate is determined. Thus when B's estate ceases, A's must also

[47](1869) 41 N. Y. 328, 334.

[48]§ 17, I R. S.* p. 723 (R. P. L. § 33, Cons., R. P. L. § 43).

have ceased. Only when the plan is considered, does the singular noun *"estate"* seem correct. The change from the singular to the plural *"estates"* in section 30 of the Real Property Law of 1896 (which replaced section 13), upon the recommendation of the Commissioners of Statutory Revision, indicates that the revisers' reason for using the singular *"estate"* and the necessity for the plan were not understood.

I have no desire to attempt a discussion or analysis of the decisions bearing upon the question of remoteness. I wish, however, to present a few considerations upon that subject.

In the first place, the new system of real property law conforms to the needs of a republic; and must therefore differ greatly from a system suited to a monarchy. In their note to the article on powers, the revisers say:

"It is not surprising therefore, that Powers should be favored in England; for the continuance of the land or property of the kingdom in the hands of its aristocracy is the basis upon which the monarchy itself may be said to rest; but with us it should never be forgotten that it is the partibility, the frequent division and unchecked alienation of property, that are essential to the health and vigor of our institutions."[49]

Remoteness of vesting in possession of the fee would certainly delay, and render less frequent, such division.

In the second place, the revisers intended in Chapter I of Part II to state the *whole* of the new system, and so clearly that even the layman could understand and act upon it. In their note they say:

"In the civil law, the regulations concerning the enjoyment, alienation and transmission of real estate, comparatively speaking, are neither numerous, nor difficult to be understood, and in the Code Napoleon, they form a very small and perfectly intelligible portion of that immortal work. It is not extravagant to say, that the French Law of Real Estate may be sufficiently understood by a few days of intelligent study.

If we look to the object which laws in relation to real property are meant to attain, *they do not seem to present any intrinsic difficulties, that should prevent us from framing a simple and intelligible system.* The owner is to be protected in the enjoyment of his property; his power of disposition is to be defined; the transmission of his estates to his descendants or relatives is to be regulated; its mode of alienation is to be prescribed; its liabil-

[49] V Edmonds, N. Y. Statutes at Large, App. 331; Fowler, Real Property Law, 1022.

ity to the claims of creditors must be secured, and to purchasers, the means of investigating the ownership must be afforded. The proper rules on these various subjects would seem derivable from a few principles of clear and general utility, level to the comprehension of all whose rights are to be affected by their application. We have no difficulty in believing, that every man of common sense may be enabled, as an owner of real property, to know the extent of his rights, and the mode of their exercise; and as a purchaser, to judge, with some assurance, of the safety of the title he is anxious to acquire."[50]

How could the intending purchaser learn from the statutes whether it is safe for him to take a title acquired under will or grant, if the statute contained only a *part* of the law, and he must go to Blackstone or Kent for the rest?

Further, it would be natural and proper that the article on the creation and division of estates in real property should state not only the *kind* of estates permitted, but also their *order* and *duration,* and the period which might legally precede the vesting of the fee in possession. Article I contains many such rules. Why take it for granted that there are others which it does not mention?

Another argument is to be found in the fact that section 42,[51] coming after the provisions allowing or forbidding certain estates, was inserted for the express purpose of forbidding all estates not allowed by preceding sections. The rule was not only as to *kind,* but also as to *number, order* and *duration* of estates permitted before the vesting of the fee in possession.

There is no suggestion, either in statute or note, that the limit for the vesting in possession of the fee should depend upon whether the remainder in fee is vested or contingent.

The revisers' objection to delay in the vesting of the fee in possession clearly appears from the provision that the third successive life estate shall be void, though the remainder in fee be vested.[52] It is further evident from the two following examples suggested by section 18:[53] (1) Devise to A for life of B, then to C for his own life, then to D in fee. Though B and C are living at the creation of the estates, the devise is forbidden by the rule that after an estate for the life of another the only remainder

[50] V Edmonds, N. Y. Statutes at Large, App. 316; Fowler, Real Property Law, 1007.

[51] § 42, I R. S.* p. 726 (R. P. L. § 26, Cons., R. P. L. § 36).

[52] § 17, literally construed, permits three successive life estates only before a reversion, not before a remainder.

[53] § 18, I R. S.* p. 724 (R. P. L. § 34, Cons., R. P. L. § 44).

permitted is a fee; (2) Devise to A for the life of B, then to C for the life of D, then to E in fee. Here the second estate for the life of another is forbidden for the reason already stated. A devise to B for life, then to D for life, then to E in fee, would be valid—although the same two lives are stated as the period or term of the estates as in the former case. Why should the law forbid the former and permit the latter? For several reasons. In the first instance, since the estate *pur autre vie* was created for the purpose of giving A's executors, administrators, or assigns possession after A's death, the revisers thought that the possession of the fee would already be long enough delayed. Experience further shows that improvements, and even repairs, are much less frequently made when the advantage to the maker is in doubt. It is not in human nature for a life tenant to expend large sums in building or repairing when the remainderman may enjoy the estate the very next day. Nor would the remainderman be willing to expend large sums in view of the possibility that the tenant might continue in possession for many years.

It must be remembered, also, that the added delay and uncertainty surrounding the time when, if ever, remaindermen will take possession, would only add to the number of that unfortunate class of persons who wait to fill dead men's shoes.

Great delay in the vesting of the fee in possession is favored by the law only in the case where the owner either would not or could not improve vacant lands; in which case one who could occupy for a long term might find it profitable to make improvements. Such estates for years were an important part of both the old and the new system.[54] An estate in a term of years is created as a new estate by the termor in the whole or in the unexpired part of the term.[55] A remainder after a term of years is created by the owner of the land at the same time that he creates the term, *e. g.*, devise to A for fifty years, then to B in fee. It will be noticed that if the termor create no new term, the term is always alienable. After A's death, it goes to his executor or administrator.

Applying to remoteness the rules which we have already applied to the suspension of the power of alienation, we escape much uncertainty and the possibility of great dispute and litigation, caused by doubt whether the remainder in a given case is vested or

[54]See Root *v.* Stuyvesant (N. Y. 1837) 18 Wend. 257, 263, 282.

[55]V Edmonds, N. Y. Statutes at Large, App. 308; Fowler, Real Property Law, 998.

contingent. The importance of removing every occasion for doubt and dispute is emphasized by the revisers in declaring the advantage of reducing the three old classes of expectant estates to one rule:

"Another most important advantage to which we have not yet adverted will result from reducing all expectant estates substantially to the same class. We shall prevent all future litigation on the purely technical question to which class or denomination any particular estate is to be referred." [56]

Bearing this discussion in mind, we find that the sections before section 42 allow—among others—the following future estates: (1) Where the prior estate is intermediate and not precedent,[57] one freehold estate, either in fee or for life; or one estate for years. (2) After a precedent estate to A for life, a remainder to B for life; remainder to C in fee: but if C die under twenty-one, then to D in fee;[30] after an estate to A for life of B, or for lives of B and C, one remainder to D in fee;[58] after an estate to A in fee, remainder to B in fee, if A die under twenty-one;[30] after an estate to A in fee, remainder to B in fee on any contingency which must occur, if at all, within two lives in being at the creation of the remainder.[59] (3) On or after a term of years, one remainder, either vested or contingent—in fee, for life, or for years;[59] but a contingent remainder must vest in interest within or at the end of two lives in being at the creation of the remainder.[27] A remainder for life must be to a person living at its creation.[60] (4) In a term of years,—after an estate to A for life of B, or of B and C,—one remainder for the residue of the term. After an estate to A for A's life, any remainder allowed by section 23.[61]

The completion of the system must be left to experts. I feel sure that when perfected it would delight the student of real property law, and restore the revisers, and the laws which they recommended, to the high place lost to them by the criticism of Judge Savage and the adoption of the Woodruff test.

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[56]Fowler, Real Property Law, 1003; V Edmonds, N. Y. Statutes at Large App. 313.

[57]V Edmonds, N. Y. Statutes at Large, App. 306; Fowler, Real Property Law, 996. Compare § 24.

[58]§§ 18, 19, I R. S.* p. 724 (R. P. L. §§ 34, 35, Cons., R. P. L. §§ 44, 45).

[59]§ 24, I R. S.* p. 724 (R. P. L. § 40, Cons., R. P. L. § 50).

[60]§ 21, I R. S.* p. 724 (R. P. L. § 37, Cons., R. P. L. § 47).

[61]§ 23, I R. S.* p. 724 (R. P. L. § 39, Cons., R. P. L. § 49).

Leaving the question of remoteness,—we have discovered the reason why two classes of void estates are pointed out and forbidden in separate sections. The distinction is clear. Estates which unduly suspend the power are themselves void.[26] Where, however, the fee is vested, so that the persons entitled to possession at the end of the third or fourth life are known, the remaindermen take possession before the time intended by the testator. The law destroys the unauthorized particular estates, rather than the fee.

If, then, Chapter I contains a worthy system of expectant estates, and under the Woodruff test section 13 would have no part therein, but under my test is needed to point out which of the excessive estates are void,—and warn against the creation of offending estates—can there be any doubt that the Woodruff test should give place to my second test, or to some better one?

If doubt still remain, let us apply the several tests and a practical question to a devise of alternative remainders under section 25:[62]

To A for life: To B for life: If C is then living, to C in fee: If C is dead, to D in fee.

Woodruff test, "Would C have the right, if the prior estates should now cease?" Answer "Yes." Result, vested.

My second test, "According to the plan of estates created, would C have the right upon the ceasing of the precedent estate?" Answer "He would, if he were then living; otherwise, not. C may then be living, or he may not." Result, contingent.

Blackstone's test, "Is the remainder in fee invariably fixed to C?" Answer "No; he may die before A or B, in which case neither C nor any one claiming under him will take." Result, contingent.

Willes' test, "Does the commencement of C's remainder depend upon some matter collateral to the ending of the precedent estate?" Answer "Yes, not only must A and B die, but C must also survive both; since his surviving neither hastens nor delays their death, it is collateral to the ending of their life estates." Result, contingent.

The test suggested by *Leonard Lovies's Case*,[5] "Is there a contingency,—and if so what?—such that if the event is one way, C's estate will never vest, and if the other way, C's estate will

[62] § 25, I R. S.* p. 724 (R. P. L. § 41, Cons., R. P. L. § 51).

vest?" Answer "There is such a contingency, viz., whether C will survive A and B." Result, contingent.

The practical question, "Can C convey absolute title to the land for the period beginning at the death of the survivor of A and B?" Answer "No; he may not survive A and B. If not, D will have the title, and the title under C's grant will fail." Result, contingent.[63]

But suppose that the first alternative remainder was to B's eldest son, and that B had no son until after the testator's death, but that one was then born, while A and B were living, and survived them both. The plan would be:

To A for life: To B for life: If B's eldest son is then alive, to the son in fee; If not, then to D in fee.

Woodruff test, at the testator's death, "Would D take if A and B should now die?" Answer "Yes." Result, vested. All the other tests would show, as in the last example, that the remainder was contingent, as would also the practical question asked in the last case. The revisers, in their note to section 25, discussed the following example:

"As where an estate is given to A for life, and if he have any issue living at his death, then to such issue in fee; but if he die without such issue, then to B in fee. Here the remainders to the issue and to B are both *contingent*, but only one can take effect."[64]

To make still more clear the effect of the definition of vested remainders, let us apply the tests to one more devise: To A for life: and at his death, to his children in fee. At the testator's death, A has children, B, C and D. E and F are born after the testator's death.

Woodruff test, "If A should now die, would B, C and D take the whole remainder?" Answer "Yes." Result, vested.

Blackstone's test, "Is the whole remainder invariably fixed to remain to B, C and D?" Answer "No. Other children may be born and have shares." Result, contingent.

My second test, "According to the plan, would B, C and D have the right to the whole remainder, upon A's death?" Answer "They would if no other children were born; otherwise, not. Other children may be born." Result, contingent.

[63]Even if § 35 (R. P. L. § 49, Cons., R. P. L. § 59) made estates in expectancy alienable, however, there remains the great difference between the power to alien one's interest, and the power to alien the land for the period of one's term by absolute title.

[64]V Edmonds, N. Y. Statutes at Large, App. 308; Fowler, Real Property Law, 999.

The practical question, "Can B, C and D convey the absolute title to the land for the period of the remainder?" Answer "No. Others may be born who will have shares." Result, contingent.

The definition of contingent remainders clearly shows that the whole remainder is contingent, because the persons to whom it is limited,—all the children of A,—remain uncertain until A dies. At no time during his life can his living children convey absolute title to the remainder. B, C and D are certain to take three shares; but there may or may not be other shares.[65]

From the whole of my argument, it follows that Chief Justice Savage's criticism and Judge Woodruff's construction of section 13 were not justified. Except in the case of certain trusts, vested remaindermen always, and contingent remaindermen never, can convey the absolute title for the term of the estate. After forming the plan of the estates created, the practical questions with respect to each estate are: (1) Can the living owner of the estate convey absolute title for its term? (2) If so, what particular estates violate the rule against remoteness, and are therefore void? (3) If not, what estates unduly suspend the power, and are therefore void?

If Bench and Bar concur in my construction of sections 13 and 29, two changes would seem to be proper. Section 41 of the Consolidated Laws, Real Property Law,[66] reads as follows:

[65]This paper has stated four devises which, at one time or another, would have been called vested, subject to divest. To understand thoroughly the rules applying to the several kinds, there should be an accurate division into classes. Among them we would find:

(1) Estates that were intended to be, and logically were, contingent, but which were saved from being wholly void under the common law, only by making them vested, subject to divest. Since our system is not troubled by the abeyance of the seisin, there is no reason why we should not call such remainders by their right name, "contingent." An example is found in the remainder to B in default of the execution of a valid power of appointment, *supra*, p. 689.

(2) Where a person in being had a vested right to a share, but it was uncertain what his aliquot part would be, or whether he would have the whole, at the natural ceasing of the prior estate. Here, though the whole estate was contingent, the old law declared the whole remainder vested, subject to divest as to shares of those who might later qualify, in order to furnish a next taker, and thus save the remainder from premature forfeiture. An example is the devise just stated in the text.

(3) Estates in which there was no condition precedent. The estate, vested for a time, might thereafter be wholly divested (a) by an event which left in the tenant an estate for life—for example the estate for life of the former tenant in tail. His estate could be divested only by his dying survived by no descendant of the class limited. (b) By an event collateral to the end of the tenant's life—for example, devise to A in fee; but if B return from Rome, then to B in fee.

In this kind of estate there is a vested estate, but the period for which it will remain vested is uncertain.

[66]§ 31, R. P. L.

"The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."

This, I submit, is inconsistent with section 55 (which we have been considering as section 29 of the Revised Statutes). The first change, therefore, which I would suggest, is the repeal of section 41. I would further urge that "is intended to take effect" replace "takes effect" in the heading of section 55, as more accurately expressing the true meaning of the section. It would also be desirable to have a settled construction of section 40 (which we have been considering as section 13 of the Revised Statutes), if not by judicial decision, then by legislative amendment. None of these changes, it is needless to say, would cast any reflection upon judges who have felt themselves bound by the decisions.

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